IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1236 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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VIJAYKUMAR @ MONTU KISHANLAL BADVAR - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MR G RAMAKRISHNAN for Appellant.
MR KT DAVE, APP for Opponent.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 29/01/2007
ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. The appellant – original accused No. 1 has filed this appeal under Section - 374 (2) of the Criminal Procedure Code against the judgment and order dated 30.07.2003 passed by the learned Additional Sessions Judge, 2nd Fast Track Court, Surat in Special Case No. 224 of 1996 whereby the appellant – original accused No. 1 was convicted for an offence under Section 8 (c), 9, 10, 21 & 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and was sentenced for R.I of 10 years with fine of Rs.1 lac (Rupees One Lac Only) and, in default thereof, to undergo R.I of 1 year more.

2. The appeal was admitted by this Court on 31.8.2004.

Since the appeal was preferred through jail, in the appeal memo itself which is in the form of a letter addressed to this Court, prayer for bail was made. This Court has, however, refused the prayer for bail. The appellant – original accused No. 1 is, therefore, in the jail right from 11.06.1996, the date on which the alleged incident was taken place.

3. The prosecution story in short is that the complainant Mr. G.P. Powar, P.S.I., D.C.B. Police Station, Surat City has filed a complaint on 11.06.1996 stating that at about 09.30 a.m. in the morning, when he was present in the Police Station, he received a telephone call from an unknown person informing him that last year one Mr. Rajesh Vicky and his wife Sapna were arrested for committing an offence punishable under the Act for keeping contraband article, namely, brownsugar with them and his two brothers, namely, Deepak and Vijay @ Montu who are staying in a house opposite to Jagdamba Provision Stores in Limbayat

Sardarnagar Society, Vijay was having large quantity of brownsugar and he used to sell the brownsugar in small packets. The informant was told that if he comes personally and informs, he would get the prize from the Government. The said Mr. Powar has noted down the discussion which was taken place on the phone with the said informant on a blank paper and it was also recorded in the Station Diary at Entry No. 5/1996 at about 09.50 a.m. To verify the correctness about this information, P.S.I. R.A. Munshi and Raol were sent to the place and the said information was found to be correct. Thereafter, this information was sent in a sealed cover to the Deputy Police Commissioner (Administration), Surat. Pursuant to this, an authorisation was issued under Section 41 (2) of the Act. The entire police staff along with F.S.L. Expert Mr. Amin M. Pathak and G.G. Sheikh were present in the Police Station. Head Constable Dilipsaheb Rao was sent to call two local reputed witnesses to work as panch witnesses. After following the detailed procedure as per the provisions of the Act and after taking weighing kits

with them, all of them have gone through the police vehicle at the place informed by the informant and while carrying out the raid in presence of police personnels, panch witnesses and FSL persons, they found the accused, namely, Vijay @ Montu at the place and in the room, below the mattresses, there was one white plastic bag wherein different packets containing brownsugar weighing about 1160 Grams were found. Over and above this, there were two small packets of brownsugar wrapped in the paper and the sale proceeds of brownsugar amounting to Rs.7,312/- were also found. Since the accused did not have any license or permit, they could not produce the same when they were asked about the same. Since the accused have kept with them the brownsugar without any license or permit for the purpose of sell, they have committed an offence under the provisions of the Act and hence, complaint was registered with D.C.B. Police Station being III Crime Register No. 220 of 1996 under the provisions of Section 8 (c), 9, 10, 21 & 29 of the Act. Other accused, namely, (1) Gaurishankar, (2) Shankar, (3)

Chand Machhiwala and (4) Rajesh @ Vicky Kishanlal were found absconders. The accused Nos. 1 & 2 were arrested after explaining them the reasons, in detail, for their arrest, and after preparing panchnama of the seizure of contraband brownsugar found from the accused.

4. After filing of the complaint and charge-sheet in the Court of learned Additional Sessions Judge, Surat, charge was framed against the accused and when they pleaded not guilty to the charge and claimed to be tried, they were put to trial by the learned Additional Sessions Judge, Surat in Special Case No. 224 of 1996.

5. To prove the culpability of the accused, the prosecution has examined as many as 15 witnesses, details of which are given in paragraph 3 of the judgment and order of the learned Additional Sessions Judge, Surat. The prosecution has also produced as many as 56 documents and 21

documents more vide list Exh. 16 and one more document vide list Exh. 142. The prosecution has also relied upon the contents of the same, details of which are given in paragraph 4 of the judgment and order of the learned Additional Sessions Judge, Surat.

6. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge, Surat explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement under Section-313 of the Code. In their further statement, the accused have denied the case of the prosecution by reiterating that they have been falsely implicated.

7. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Additional Sessions Judge, Surat has acquitted the orig. accused No. 2. He, however, held the appellant – orig. accused No. 1 as guilty of

committing an offence punishable under Section 8 (c), 9, 10, 21 & 29 of the Act and he was convicted of the said offence.

8. The learned Additional Sessions Judge, Surat thereafter heard the accused and his advocate on sentence and looking to the gravity of the offence committed by the accused and looking to the circumstances, accused No. 1 was sentenced to suffer R.I of 10 years and fine of Rs. 1 Lac and in default thereof, R.I. of one year more for an offence punishable under Section 8 (c), 9, 10, 21 & 29 of the Act.

9. Being aggrieved by the said judgment and order, the appellant – orig. accused No. 1 has filed the aforesaid appeal before this Court.

10. Mr. G. Ramakrishnan, learned advocate appointed by the High Court Legal Aid Committee and appearing for the appellant – original accused No. 1 has submitted that the learned Additional Sessions

Judge has committed an error on the face of the record by convicting the appellant – original accused No. 1 for the offence punishable under Section 8 (c), 9, 10, 21 & 29 of the Act. The learned Additional Sessions Judge has misdirected himself in appreciating the evidence placed on record. The learned Additional Sessions Judge recorded the findings which are not based on the evidence on record. The learned Additional Sessions Judge should have appreciated the evidence and should have also held that the prosecution has failed to prove the offence against the appellant – original accused No. 1 beyond reasonable doubt. The learned Additional Sessions Judge has failed to consider the mandatory provisions of Sections 42, 50, 52, 55 and 57 of the Act. He has further submitted that the learned Additional Sessions Judge has brushed aside all the contradictions appeared in the depositions of the witnesses. There are material contradictions in the deposition and these contradictions show that there are many doubts in the case of the prosecution and, therefore, benefit of doubt ought to have been

given to the appellant – accused No. 1. The learned Additional Sessions Judge has failed to consider the legal aspects of the mandatory provisions of the Act. There is a breach and violation of mandatory provision of the Act and since all these provisions have not been complied with by the prosecution, the judgment and order of conviction is liable to be quashed and set aside.

11. Mr. G. Ramakrishnan has further submitted that since the appellant – orig. accused No. 1 has already undergone substantive sentence of 10 years and if this Court is not inclined to interfere in the judgment and order of conviction and sentence, further imprisonment in default of payment of fine imposed by the learned Additional Sessions Judge for the period of one year may be reduced to six months.

12. Mr. K.T. Dave, learned Additional Public Prosecutor, on the other hand has supported the order and judgment of the learned Additional Sessions Judge, Surat and submitted that there was no violation of

any statutory provision and all necessary compliances were made by the raiding parties and/or investigating agency and there was no substance in the argument that the provisions contained in Section 42, 50, 55 & 57 of the Act were violated. He has further submitted that the prosecution has clearly established beyond reasonable doubt that the charge is levelled against the appellant – orig. accused No. 1. He has, therefore, submitted that the appellant – orig. accused No. 1 was rightly convicted. Since the prosecution has established by all possible, believable, trustworthy and corroborative evidence and since the documentary evidence on the record of the proceedings clearly establish the involvement, presence and role of the appellant – orig. accused No. 1 in the offences charged with, even if there is any discrepancy from the testimonies of the prosecution witnesses, the same would not affect the case of the prosecution. The prosecution having clearly established beyond reasonable doubt the guilt of the accused, the conviction order passed by the Learned Additional

Sessions Judge is required to be upheld.

13. Though several contentions were raised before the Trial Court and before this Court, we do not think it just and proper to deal with the same in great detail, in view of the fact that the appellant – accused No. 1 has already undergone the substantive sentence of rigorous imprisonment of 10 years and in view of the further fact that Mr. G. Ramakrishnan has made an alternative submission to reduce the period of default sentence. Even otherwise, from the detailed examination and analysis of the prosecution witnesses and the documentary evidence produced on record by the prosecution, it appears to us that the charge levelled against the appellant – orig. accused No. 1 has been proved beyond any reasonable doubt. The learned Additional Sessions Judge has discussed the evidence of each witnesses and the documentary evidence at great length and the conclusion drawn by him after proper appreciation of the evidence is just and proper and we are in complete agreement with the finding

arrived at by the learned Additional Sessions Judge so far as appellant – orig. accused No. 1 is concerned. We, however, make it clear that there is no need to convict the appellant – accused No. 1 under Section 9 & 10 of the Act. Section 9 deals with power of Central Government to permit, control and regulate, whereas Section 10 of the Act deals with power of State Government to permit, control and regulate. The conviction, therefore, is only under Section 8 (c) read with Section 21 and 29 of the Act.

14. The evidence led by the prosecution and discussed by the learned Additional Sessions Judge makes it abundantly clear that there was no violation of any statutory provision and proper record was maintained with regard to the muddamal articles. Even there was no defect in the sealing procedure. We, therefore, do not want to interfere in the judgment and order passed by the learned Additional Sessions Judge, Surat imposing substantive sentence

of R.I. of 10 years and fine of Rs. 1 Lac. However, in default of fine, further sentence of R.I. of 1 year imposed by the learned Additional Sessions Judge is not just and proper and to this extent, we modify the order of the learned Additional Sessions Judge, Surat by imposing sentence of six months instead of one year in default of payment of fine. Hence, this appeal of the appellant – orig. accused No. 1 is partly allowed to this extent. We take note of the situation with all seriousness that the appellant – accused No. 1 has undergone the entire period of substantive sentence during the pendency of this appeal.

15. Since the appellant – orig. accused No. 1 has already undergone R.I. of 10 years and seven months which is more than the substantive sentence of R.I. of 10 years and further sentence of six months in default of payment of fine as modified by this Court, the appellant – orig. accused No. 1 is required to be released forthwith if his presence is not required in any other offence.

16.In the result, the appeal is partly allowed whereby the conviction and substantive sentence of the appellant – orig. accused No. 1 is confirmed and sentence of R.I. of one year more imposed by the learned Additional Sessions Judge, Surat in default of payment of fine of Rs. 1 Lac is substituted by sentence of six months only.

17.This appeal is accordingly allowed in part to the above extent.

[A. M. KAPADIA, J.]

[K. A. PUJ, J.]

Savariya